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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

ERNEST L. NELSON, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

I. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PETITIONER BY ALLOWING AN EXPERT WITNESS TO TESTIFY IN THE PROSECUTION'S CASE-IN-CHIEF TO THE GENERAL TRUTHFULNESS OF CHILD SEXUAL ABUSE VICTIMS, WHERE SUCH EVIDENCE WAS NOT OFFERED TO REBUT ANY ISSUE PREVIOUSLY RAISED BY THE DEFENSE?

II. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE TRIAL JUDGE'S ADMISSION, DURING PROSECUTION'S CASE-IN-CHIEF, OF CUMULATIVE AND CONSISTENT OUT-OF-COURT STATEMENTS BY THE VICTIM, WHERE THE VICTIM WAS NEVER CROSS-EXAMINED BY THE DEFENSE?

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In the Supreme Court of the United States

OCTOBER TERM, 1987

ERNEST L. NELSON, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Ernest L. Nelson, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding on September 28, 1987.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 25 M.J. 110 (C.M.A. 1987) (Appendix A). The decision of the United States Air Force Court of Military Review is reported at 21 M.J. 711 (A.F.C.M.R. 1985) (Appendix B).

JURISDICTION

The decision of the United States Court of Military Appeals was rendered on September 28, 1987. The jurisdiction of this court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

The alleged victim in the case was Petitioner's six-year-old stepdaughter, Veda Jane Lansford. While visiting her grandmother in June 1984, Veda Jane complained of pain in her "private parts". (R. 176). Suspicious of sexual abuse, the grandmother took Veda Jane to the hospital at Blytheville Air Force Base, where she was seen by Doctor Chastain, the Chief of Pediatrics. (R. 175-176). Dr. Chastain found no physical evidence of sexual abuse. (R. 176). However, during the examination, he pointedly asked Veda Jane if her stepfather had touched her in her genital area, to which she responded by nodding in the affirmative. (R. 176). Dr. Chastain then referred the victim to the Suspected Child Abuse and Neglect Agency, where she was seen by Mr. Perry Jenkins. (R. 176). Mr. Jenkins interviewed Veda Jane, and through the use of anatomically correct dolls, acquired from her that her stepfather, SSgt Ernest L. Nelson, Jr., had touched her vaginal area with his hand. (R. 285).

Approximately two months later, Veda Jane was seen by Ms. Julie Mittleman, a counselor with the Bay County Guidance Clinic. Once again, through the use of anatomically correct dolls, the victim indicated that Petitioner touched her in her private parts. This time she suggested, through the use of the dolls, that Petitioner had touched her with both his hand and his mouth. (R. 186).

Veda Jane testified at trial. (R. 116-164). Throughout her testimony she was extremely evasive and reluctant to talk. The record is replete with her failures to answer trial counsel's questions or her responses that she "forgot" (R. 118-121). When asked a question directly bearing on the alleged offense, the witness responded as follows:

TC: Who was that somebody? Who was it that did something to you?

WIT: (Would not answer. Was looking at the people in the room).

(R. 140)

Finally, trial counsel was able to elicit, through the use of leading questions and only by reference to the dolls, that petitioner had touched the complainant in her genital area.

There was no other "eyewitness" testimony to the alleged offense, nor any corroborating physical evidence of sexual abuse presented. Defense counsel elected not to cross-examine Veda Jane.

In their case-in-chief, prosecution introduced, over defense's previous objection, a stipulation of expected testimony of Dr. Chastain. (R. 86, 174-177). As part of that stipulation, Dr. Chastain related the following out-of-court statements made by the alleged victim:

> I subsequently questioned Jane myself. I asked Jane, 'Did your stepfather try to place his peter in you?' to which she nodded affirmatively. I also asked her, 'Did your stepfather use his mouth on you?' Again, she nodded affirmatively. (R. 176).

The prosecution then offered the testimony of Ms. Mittleman concerning "statements" made by the complainant through the use of the dolls. (R. 177 *et. seq.*). Finally, trial counsel offered the testimony of Dr. Hord, a clinical psychologist who had never had contact with the alleged victim. (R. 196). The trial judge allowed Dr. Hord to testify over defense counsel's objection. (R. 196). Dr. Hord explained why sexually abused children might not quickly report an incident of sexual abuse. He then testified that when a child does reveal such abuse the child could not be lying, but must be telling the truth. (R. 204). Finally, he stated that, in his experience, a child would not normally make false claims of sexual abuse solely upon viewing a pornographic film. (R. 200-204).

REASONS FOR GRANTING THE WRIT

QUESTION ONE

Dr. Hord was allowed to testify that generally, children do not lie when they allege sexual abuse by an adult. The effect of this testimony was to improperly suggest to the court members that the complainant child was telling the truth and, consequently, the accused was guilty. A longstanding body of case law has held that expert opinions concerning either the credibility of the evidence or opinions as to guilt or innocence are matters to be reserved solely for the factfinder and are not proper evidence. *State v. Myers*, 382 N.W. 2d 92, 94 (Iowa 1986).[1]

Presumably, this testimony was offered under Military Rules of Evidence 701, 702 and 704. The thrust of these rules is clearly to broaden the admissibility of expert textimony. *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987); *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985); *United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984). Although the rules allow expert witnesses to express opinions, even if the testimony embraces an "ultimate issue" to be decided by the trier of fact, there are still important limiting parameters to such opinions, insuring due process of law is maintained.

Military Rule of Evidence 704 was taken verbatim from Federal Rule of Evidence 704. The drafters of the federal rule carefully explained that:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact,

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[1] *Accord, United States v. Binder*, 769 F.2d 595 (9th Cir. 1985); *United States v. Jensen*, 608 F.2d 1349 (10th Cir. 1979); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983); *State v. Correra*, 430 A.2d 1251 (R.I. 1981); *State v. Perkins*, 444 N.E. 2d 878 (Ind. App. 1983).

> and Rule 403 provides for exclusion of evidence which wastes time. *These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach. . .*

Federal Rule of Evidence 704, Adivisory Committee's Note, 57 F.R.D. 405 (1971) (emphasis added). Similarly, the analysis to Military Rule of Evidence 704 provides that the rule "does not permit the witness to testify as to his or her opinion as to the guilt or innocence of the accused, or to state legal opinions." Manual for Courts-Martial 1984, Appendix 22 at A22-41.

The United States Court of Military Appeals has also reflected this interpretation of Military Rule of Evidence 704. In *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985), the court held that "absent unusual circumstances, opinion testimony on whether or not to believe a particular witness's testimony simply is not deemed helpful to the factfinder, for the factfinders are perfectly capable of observing and assessing a witness's credibility." *Id.* at 63. *See also, United States v. Peterson*, 24 M.J. 283 (C.M.A. 1987) (court rejected expert opinion of victim's credibility as being outside the ambit of Mil. R. Evid. 704 or 608).

Although the Court of Military Appeals did allow expert witnesses to testify directly to the credibility of a sexually abused child victim in *United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984), they distinguished this particular ruling in *United States v. Peterson*, 24 M.J. 283 (C.M.A. 1987). In *Peterson* the court explained that this evidence was admitted in *Snipes* only because the defense opened the door to such evidence by asking a witness a question pertaining to the believability of a victim. *Id.* at 283.[2]

Except for such "unusual circumstances" as found in *Snipes*, the Court of Military Appeals has cautiously ruled

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[2] *See also, State v. Myers*, 359 N.W. 2d 604 (Minn. 1984) (expert testimony as to typical characteristic of truthfulness of child victims allowed only because accused opened the door in cross-examination).

against allowing experts to testify as to a witness's credibility. Chief Judge Everett has continuously voiced his concern that such expert opinions have "meager scientific basis and minimum value" yet have "substantial potential for misleading the factfinder." *United States v. Cameron, supra*, at 65. In his concurring opinion in *United States v. Snipes, supra*, he expressed his concern that an expert witness's testimony may be allowed to "outrun the scope of his expertise." *Id.* at 180. He further explained his position by stating:

> Indeed, hearing a purported expert give his opinion about the credibility of a witness may hinder the factfinder by distracting him from using his own experience and common sense which provide the best means for him to determine the truthfulness of testimony he had heard. *Id.*

An expert's testimony that young children do not lie about sexual matters is simply not helpful to a jury. Certainly, it is within the common knowledge of any jury member that children would have to have some type of exposure to or sexual experience in order to acquire the necessary knowledge to make such accusations. *State v. McCafferty*, 356 N.W. 2d 159, 164 (S.D. 1984) ("a young child is unlikely to fabricate a graphic account of sexual activity because such is beyond the realm of his or her experience"); *State v. Myers*, 382 N.W. 2d 91 (Iowa 1986). In *Myers*, the prosecution called two witnesses who testified that children are generally truthful when they report they have been sexually abused. *Id.* at 92. The Supreme Court of Iowa held that such testimony was improper as it did not assist the trier of fact in determining a fact in issue, but instead, improperly invaded the function of the jury in determining witness credibility. *Id.* at 97. The court concluded that such testimony improperly allowed the jury to

consider expert testimony tantamount to conclusions that the accused was guilty. *Id.* at 98.[3]

This is not to say that experts cannot express opinions that explain pertinent and relevant mental and psychological symptoms which may be present in sexually abused children. *See, State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983) (allowing expert testimony regarding typical reaction of young child raped by family member). Indeed, it was on such a basis that the Court of Military Appeals decided the present case. Relying on their ruling in *United States v. Snipes, supra*, they held "there is a sufficient body of 'specialized knowledge' regarding 'the typical behavior of sexually abused children and their families', such that the conclusions which an expert draws as to these 'behavioral patterns' are permissible." *United States v. Nelson*, 25 M.J. 110, 113 (C.M.A. 1987) (citing *United States v. Snipes, supra* at 179).

Based upon these grounds, the court's ruling must fail. Dr. Hord did not testify as to typical "behavioral patterns" of sexually abused children. Rather, he testified directly to the credibility of the witness, specifically suggesting to the court members that the witness must be telling the truth. Such a comment on the witness's credibility "crossed that *fine but essential line* between an opinion which would be truly helpful to the jury and that which merely conveys a conclusion concerning the defendant's legal guilt." *State v. Myers, supra*, at 98 (emphasis added).

The prejudice inherent in allowing Dr. Hord to testify far outweighed any probative value of such testimony, if indeed such opinions are determined to be probative. *State v. Logue*, 372 N.W. 2d 151 (S.D. 1985). The only evidence in the case was Veda Jane's testimony, as the remaining evidence was neither corroborative of the victim's com-

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[3] *Accord, Tevlin v. People*, 715 P.2d 338 (Colo. 1986); *People v. Koon*, 713 P.2d 410 (Colo. App. 1985); *see also, People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291 (1984); *People v. Roscoe*, 215 Cal. Rptr 45, 168 Cal. App. 3d 1093 (1985).

plaint nor overwhelming as to the guilt of the accused. Chief Judge Everett's comments to a similar situation in *United States v. Snipes, supra*, are apt warnings in the case *sub judice*, wherein he remarked:

> . . . I have the disquieting belief that appellant's conviction may have been a miscarriage of justice. *Id.* at 180.

A trial judge's decision to admit expert testimony is only reversible where there is manifest error or abuse of discretion. *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985); *United States v. Marabelles*, 724 F.2d 1374 (9th Cir. 1984). Erroneous admissions should be reversed if the evidence more likely than not materially affected the verdict. *United States v. Binder, supra* at 601-602. Where there remains grave doubt as to the effect of the error upon the verdict, the conviction cannot stand. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Because the proof in this case was precariously balanced on the believability of Veda Jane's testimony, it is extremely likely that Dr. Hord's testimony affected the jury's verdict. Reversal is, therefore, required.

QUESTION TWO

At trial, Veda Jane testified, with the aid of the anatomically correct dolls, that Petitioner touched her genital area with his hand and mouth. The jury had an opportunity to view her demeanor, and had the sole responsibility to determine her credibility. This determination was especially critical, as her testimony was the only evidence that Petitioner committed the offense.

It is clear from the record, that Veda Jane was hesitant and evasive in her testimony, which likely diminished her credibility before the jury. Prosecution's only purpose, then, in presenting the testimony of Dr. Chastain and Ms. Mittleman was to bolster the victim's credibility by allowing the jury to hear the repetitions of the same story; this time by a pediatrician and a mental health specialist. By

doing so, the trial court returned to a medieval concept of "trial by oath-helper", suggesting to the jury that the witness was credible because of her repetition of the story.

There is only one rule that will assure fundamental fairness and due process of law; a witness should be evaluated for truthfulness on their own merit and testimony, without assistance of oath-helpers repeating what the witness has already testified to. There is simply no support under the law to the admission of testimony for the purpose of buttressing a witness' testimony by repetition of that testimony through the introduction of out-of-court statements where the *only* purpose of the evidence is the repetition itself. *State v. Seever*, 41 Crim. L. Rep. (BNA) 2312 (Mo. Sup. Ct. June 14, 1987); *see*, Military Rule of Evidence 801(d)(1)(B).[4]

Although Military Rule of Evidence 803(4) allows the admission of statements made out of court if made for the purpose of medical diagnosis or treatment, such statements should not be admitted if, under Military Rule of Evidence 403, the evidence is substantially more prejudicial than probative. *See*, S. Saltzburg, L. Schinasi, D. Schlueter, *Military Rules of Evidence Manual* (2d ed. 1986), p. 639-640. The admission of Veda Jane's out-of-court statements was highly prejudicial to the Petitioner. Because of her in-court testimony, Veda Jane's credibility was certainly in question. Allowing prosecution to present the statements she made to Dr. Chastain (amounting to affirmative nods to the Doctor's direct and leading questions) and to Ms. Mittleman (responses made only through the use of dolls)—the very statements the victim had already made at trial before the jury—would only confuse and bias the court members in performing their duty of

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[4] *See also*, S. Saltzburg, L. Schinasi, D. Schlueter, *Military Rules of Evidence Manual* (2d ed. 1986), p. 614, ("This limitation reflects the common law view that someone who repeats the same story over and over is not necessarily likely to be more truthful than someone who says the same thing just once. A lie often repeated does not become the truth.").

evaluating the victim's demeanor and the quality of her testimony.

At trial, the defense objected to the testimony of Dr. Chastain. Upon the trial judge's ruling that his testimony was admissible, Petitioner concurred in the stipulation for expected testimony of Dr. Chastain. Additionally, defense did not object to the testimony of Ms. Mittleman. Nevertheless, Military Rule of Evidence 103(d) makes clear that the absence of an objection does not render moot the review of an error which "seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Young*, 470 U.S. 1, 15 (1984); *see also, United States v. Fischer*, 21 M.J. 327 (C.M.A. 1986); *cf.*, Mil. R. Evid. 103(c); *but see United States v. White*, 25 M.J. 50 (C.M.A. 1987). By admitting the testimony of these two prosecution witnesses, when no attack had been made against the credibility of Veda Jane's in-court testimony, the trial judge abandoned his responsibility to insure that Petitioner received a fair trial. The error was blatant, substantial and prejudicial.

CONCLUSION

Petitioner submits that his petition for writ of certiorari should be granted.

Respectfully Submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS.

No. 54,383.
ACM 24775.

UNITED STATES, APPELLEE,

v.

ERNEST L. NELSON, STAFF SERGEANT,
U.S. AIR FORCE, APPELLANT.

Sept. 28, 1987.

Accused, a staff sergant in the United States Air Force, was convicted by general court-martial of committing indecent, lewd, and lascivious acts with a child, and he appealed. The United States Air Force Court of Military Review, 21 M.J. 711, affirmed. Review was granted. The United States Court of Military Appeals, Cox, J., held that: (1) pediatrician and psychologists' testimony to statements of child was admissible (2) testimony of doctor of clinical psychology and expert in field of behavior of sexually abused children was admissible; and (3) testimony of psychologist and social worker to child's reactions to anatomically correct dolls used during their out-of-court interviews with child was admissible.

Affirmed.

For Appellant: *Major Charles L. Willie* (argued); *Colonel Leo L. Sergi* and *Major William H. Lamb* (on brief).

For Appellee: *Captain Jeffrey H. Curtis* (argued); *Colonel Kenneth R. Rengert* and *Lieutenant Colonel Donal F.*

Hartman, Jr. (on brief); *Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni; Major Robert J. Webster* (USAFR).

OPINION OF THE COURT

COX, Judge:

Contrary to his pleas, appellant was convicted by a general court-martial composed of officer and enlisted members of committing indecent, lewd, and lascivious acts with his stepdaughter, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. He was sentenced to a bad-conduct discharge, confinement for 2 years, forfeiture of $310.00 per month for 2 years, and reduction to the lowest enlisted pay grade. The convening authority approved, and the Court of Military Review affirmed, these results. 21 M.J. 711 (1985).

This Court granted review of the following issues:

I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ALLOWING OVER DEFENSE OBJECTION TESTIMONY FROM PROSECUTION WITNESSES AS TO PRIOR OUT-OF-COURT STATEMENTS BY THE PURPORTED VICTIM WHERE SUCH STATEMENTS WERE OFFERED IN THE PROSECUTION'S CASE-IN-CHIEF AFTER THE PURPORTED VICTIM TESTIFIED AND WHERE THE PURPORTED VICTIM HAD NOT BEEN CROSS-EXAMINED BY THE DEFENSE.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED IN HOLDING

THAT AN EXPERT WITNESS COULD TESTIFY TO THE USUAL TRUTHFULNESS OF CHILD VICTIMS.

III

WHETHER THE TESTIMONY OF THE WITNESSES MITTLEMAN AND JENKINS AS IT RELATED TO OUT-OF-COURT INTERVIEWS WITH THE CHILD WITNESS DURING WHICH CERTAIN VERBAL AND NONVERBAL STATEMENTS WERE TAKEN FROM THE WITNESS THROUGH THE USE OF ANATOMICALLY CORRECT DOLLS SHOULD NOT HAVE BEEN ADMITTED SINCE SUCH VERBAL AND NONVERBAL STATEMENTS WERE NOT SUBJECT TO CROSS-EXAMINATION.

This case presents a difficult scenario because it is based entirely on the statements of the victim, appellant's 6-year-old stepdaughter. There were no eyewitnesses, no confession, and no physical corroboration of the victim's complaint. Much of the information obtained in the trial was introduced through the testimony of mental-health professionals and others who had interviewed the child during the investigation into the alleged offenses. Their testimony forms the basis for the allegations of error in the granted issues.

I

[1] At the outset it should be noted that there was no denial of appellant's Sixth Amendment right of confrontation in this case. *See California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *United States v. LeMere*, 22 M.J. 61 (C.M.A.1986). The child, Jane, was called to testify and did so. Defense counsel waived cross-

examination. On appeal, appellant objects to the admission of the testimony of Dr. Chastain, a pediatrician, and Ms. Mittleman, a psychologist, under Mil.R.Evid. 803(4), Manual for Courts-Martial, United States, 1984.

[2,3] Mil.R.Evid. 803(4) excepts from the rule against hearsay statements made by the declarant for purposes of medical diagnosis and treatment. Its applicability is not limited to statements made to medical doctors and may include statements made to psychologists. *United States v. Welch*, 25 M.J. 23 (C.M.A.1987). The key to applicability of the exception is whether the patient has some expectation of promoting his well-being and thus an incentive to be truthful. *United States v. Deland*, 22 M.J. 70 (C.M.A.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 196, 93 L.Ed.2d 128 (1986).

[4] Here, the military judge found as a matter of fact that the statements were made for the purpose of diagnosis and treatment. Evidence in the record supports the judge's finding in that it shows that Dr. Chastain's purpose in obtaining the information from the child was "to insure that she was in no physical danger, not suffering from an infection, and free from medical distress." Ms. Mittleman's purpose in obtaining information from the child was to develop a diagnosis and plan of treatment for any mental/emotional problems. Moreover, there was no evidence that the child's motive in making her statements to Dr. Chastain or Ms. Mittleman was other than that of a patient responding to a doctor questioning her for diagnosis and treatment.

Appellant also contends that this evidence was cumulative and prejudicial in that it, in effect, bolstered the child's testimony. No objection on the basis of Mil.R.Evid. 403 was made at trial, and admission of this evidence does not constitute plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A.1986). Accordingly, we hold

that the military judge did not err in admitting the testimony.

II

[5,6] Appellant's second allegation of error concerns the testimony of Dr. Hord, a doctor of clinical psychology and an expert in the field of the behavior of sexually-abused children. The threshold question in determining admissibility of expert testimony is whether it would be helpful to the factfinder in resolving the facts in issue. *See* Mil.R.Evid. 702; *United States v. Gipson*, 24 M.J. 246 (C.M.A.1987). "[T]he thrust of the" rules of evidence "is to make more expert testimony available to the fact-finders than previously." *Id.* at 251.

In the case at bar, Dr. Hord was asked to opine why a child might not quickly report an incident of sexual abuse; whether a child would be prompted to fabricate an allegation of sexual abuse upon viewing a pornographic videocassette; and what, if any, relevance an adult's sexual orientation might have on the possibility or probability of his committing sexual offenses against a child.* This Court has held "that there is a sufficient body of 'specialized knowledge' " regarding "the typical behavior of sexually abused children and their families," such that the conclusions which an expert draws as to these "behavioral patterns" are admissible. *United States v. Snipes*, 18 M.J. 172, 179 (C.M.A.1984). Our review of the record discloses no abuse of discretion by the military judge in permitting

* Although the issue is styled based upon the Court of Military Review's characterization of Dr. Hord's testimony as being "limited to comments about the usual truthfulness of child victims," 21 M.J. 711, 713 (1985), in context, Dr. Hord's comments were actually tailored to the characteristics he had observed in his experience in treating children who were allegedly sexually abused.

Dr. Hord's testimony. This is especially true as defense-counsel did not object to the questions or to the content of any of Dr. Hord's responses. Mil.R.Evid. 103(a)(1).

III

[7,8] Appellant's final issue asserts that Ms. Mittleman, the psychologist, and Mr. Jenkins, a social worker, should not have been permitted to testify about the child's reactions to the anatomically correct dolls which they used during their out-of-court interviews with the child. The use of anatomically correct dolls is an accepted clinical procedure for interviewing suspected victims of child abuse. *See, e.g., United States v. LeMere, supra*, 22 M.J. 61, 64 (child allowed to use anatomically correct dolls to facilitate her testimony). The clinicians were available to explain their observations upon cross-examination and did so. The child illustrated her testimony by using the dolls in court, at which time she was available for cross-examination. Defense affirmatively waived the opportunity to cross-examine her. Therefore, we find no violation of appellant's Sixth Amendment right to confrontation. Furthermore, no objection was made at trial to the witnesses' references to the anatomical dolls. Mil.R.Evid. 103(a)(1). Admission of expert testimony "is a matter within the discretion of the military judge." *United States v. Snipes, supra* at 178. Appellant has not demonstrated that the military judge abused his discretion in this matter, and we do not find plain error. *See United States v. Fisher, supra.*

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT and Judge SULLIVAN concur.

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24775

UNITED STATES

v.

STAFF SERGEANT ERNEST L. NELSON, JR., FR 429-15-9175
UNITED STATES AIR FORCE

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3 DEC 1985

Sentence adjudged 6 February 1985 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: David M. Lewis.

Approved sentence: Bad conduct discharge, confinement for two (2) years, forfeiture of three hundred ten dollars ($310.00) per month for two (2) years and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Major William H. Lamb. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Lieutenant Colonel Donal F. Hartman, Jr.

Before

FORAY, MURDOCK AND O'HAIR
Appellate Military Judges

DECISION

MURDOCK, Judge:

The appellant was charged with one specification of taking indecent liberties with a child, and was convicted by a

court consisting of officer and enlisted members of the lesser included offense of lewd and lascivious acts with a child. He was sentenced to a bad conduct discharge, two years confinement, forfeiture of $310 per month for two years, and reduction to airman basic. He has asserted five errors, primarily concerning the use of experts and the admissibility of prior consistent statements. There was error in the way prior consistent statements were handled, but we find the error was harmless and we affirm.

This case relies entirely on the testimony of the victim, the appellant's six year old stepdaughter. Much of the information she contributed was introduced through the testimony of others who interviewed her during the course of this case's investigation. This secondhand information forms the basis of all of the errors to be discussed here.

I

The appellant asserts that it was error to admit the stipulation of expected testimony of Mr. Jenkins, a child protective agency intake worker, in rebuttal. We agree. The trial counsel moved to admit the stipulation by stating it was being presented either "simply as rebuttal evidence under [R.C.M.] 931c(1)(c) or as a very clear prior statement by a witness under [Mil. R. Evid.] 801d(1)(b)." The stipulation was admitted over vigorous objection. The first problem with the trial counsel's motion is that R.C.M. 913c(1) merely lists the order of presentation of evidence in the case on the merits. It is not, by itself, a basis for admissibility. Despite the trial counsel's statement to the contrary, this motion was really based solely on the stipulation being admissible as evidence of a prior consistent statement.

This case presents the question of the admissibility of prior consistent statements for rebuttal. As a general rule, evidence must have been presented to the court before it can be rebutted. In the present case, the trial counsel at-

tempted to introduce the stipulation to rebut inferences, raised at trial, that the child's grandmother had exerted undue influence over her. We agree with Chief Judge Everett in his dissent in *United States v. Meyers*, 18 M.J. 347 (C.M.A. 1984), that the key to these difficult cases is relevance.

The stipulation of expected testimony was based on statements made to Mr. Jenkins by the child after she had been living with her grandmother for about one month. By introducing the stipulation, the trial counsel was trying to rebut inferences of the undue influence of this very same grandmother. It is logically impossible to rebut allegations of undue influence by introducing a statement produced while the speaker is still living under the influence of the person whose influence the rebuttal seeks to disprove. Because of this impossibility, the statement made by the child to Mr. Jenkins is not relevant to resolve whether the grandmother caused the child to accuse the appellant falsely by exerting undue influence over her. Mil. R. Evid. 401. As a result, the stipulation of expected testimony was not admissible as evidence of a prior consistent statement. Mil. R. Evid. 402 and 801(d)(1)(B).

Harmless error results when it is not reasonably probable that the fact finders were swayed by invalid evidence. *United States v. Clark*, 12 M.J. 978 (A.F.C.M.R. 1982). The evidence in this case is basically limited to the assertions of a 6 year old girl against the denial of her stepfather, the accused. The proof of this case was necessarily precariously balanced on the believability of the young girl's testimony. Unlike the situation in *United States v. Browder*, 19 M.J. 988 (A.F.C.M.R. 1985), where the prior consistent statements presented new material to the fact finder, the stipulation in the present case was merely another recitation of information already before the court. Although it was error to admit the stipulation, it

was harmless in this case. *United States v. Carson*, 702 F.2d 351 (2d Cir.), cert denied ____ U.S. ____, 103 S.Ct. 2456, 77 L.Ed. 2d 1335 (1983).

II

In two separate but related assignments of error, the appellant asserts that it was error to allow a clinical psychologist to testify about generalized behavior patterns of known or suspected abused children or for any of the expert witnesses to base their testimony on statements made by the victim when she was interviewed with the help of anatomically correct interview dolls. We disagree.

All the witnesses concerned in these assertions of error were recognized by the court as experts. Expert testimony cannot be evaluated by ordinary standards. It is inherent in the nature of experts that they may be discussing concepts or using techniques that we may not readily understand. The reason we ask experts to testify, and the reason we allow them to state their opinion is because they possess specialized knowledge in areas nonexperts may not understand. Expert testimony is governed by Military Rule of Evidence 702 which provides:

> Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The appellant has asserted that it was error to allow Dr. Hord, a clinical psychologist called by the government, to testify about generalized behavior patterns of known or suspected abused children. Dr. Hord did not offer his opinion on the specific truthfulness of the victim in this case. In fact, although he had reviewed a case file the trial counsel had provided, Dr. Hord had not even interviewed the child victim. *See United States v. Cameron*, 21 M.J.

59 (C.M.A. 1985). Instead, his testimony was limited to comments about the usual truthfulness of child victims. Specifically, that since the subject matter involved in reports of sexual abuse is normally unknown to children who are the same general age as the victim in this case, reports of sexual abuse by young children are usually truthful. This type of expert testimony has already been declared admissible in courts-martial. *United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984). The expert's testimony in the present case was well within the expected range of his expertise.

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No. 87-868

In the Supreme Court of the United States

OCTOBER TERM, 1987

ERNEST L. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge erred by permitting an expert witness to testify about certain characteristics of child sex abuse victims in response to a defense claim that the child victim's testimony was fabricated.

2. Whether the trial judge committed plain error by admitting the victim's out-of-court statements.

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ERNEST L. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 25 M.J. 110. The decision of the Air Force Court of Military Review (Pet. App. 7a-11a) is reported at 21 M.J. 711.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 28, 1987. The petition for a writ of certiorari was filed on November 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at Tyndall Air Force Base in Florida, petitioner, a member of the United States Air Force, was convicted of committing indecent, lewd, and lascivious acts upon a female under 16 years of age, in

violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to confinement for two years, a bad conduct discharge, and ancillary punishments. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 7a-11a). The Court of Military Appeals affirmed (*id.* at 1a-6a).

1. Veda Jane Lunsford, petitioner's six-year-old stepdaughter, was the victim in this case. In July 1984, while visiting her grandmother, Veda Jane complained of pain in her "private parts" (Tr. 176). Her grandmother took her to the emergency room at Blytheville Air Force Base in Arkansas, where she was examined by Dr. David Chastain, a pediatrician in that facility. During his treatment of Veda Jane, Dr. Chastain elicited from her that petitioner had tried to place his penis in her and that he had also performed oral sex on her (*ibid.*). Dr. Chastain then contacted Perry Jenkins, an investigator with the Arkansas Suspected Child Abuse and Neglect Agency. Jenkins interviewed Veda Jane on July 5, 1984, using anatomically correct dolls to assist in the interview. Veda Jane related that petitioner had touched her vagina with his finger (Tr. 285).

Julie Mittleman, an expert in the field of child school psychology, examined Veda Jane on September 5, 1984 (Tr. 53). Veda Jane told Julie Mittleman that petitioner had pulled her panties down, had rubbed his penis against her vagina, and had placed his face in her vaginal area (Tr. 184-186).

Veda Jane testified at trial that petitioner "did something wrong to her" (Tr. 140-141); that the event occurred in their home at Tyndall Air Force Base (Tr. 141); that petitioner had touched her vaginal area with his right index finger (Tr. 143-144, 157); and that petitioner had taken his and her pants off (Tr. 144, 146). Veda Jane also acknowledged that petitioner had gotten on top of her and

had placed his mouth on her vagina (Tr. 156-158). She testified that this scenario occurred on more than one occasion (Tr. 160). In the course of her testimony, she used anatomically correct dolls to demonstrate what petitioner had done to her. The defense declined to cross-examine Veda Jane (Tr. 122).

2. In addition to Veda Jane's testimony, the prosecution introduced a stipulation of the expected testimony of Dr. Chastain (Tr. 174-177) and live testimony from Julie Mittleman (Tr. 177-193). Both Dr. Chastain and Julie Mittleman related Veda Jane's statements to them regarding the sexual abuse. On cross-examination of Ms. Mittleman, defense counsel elicited that petitioner and his wife had told her that Veda Jane may have fantasized the events she reported after seeing a pornographic movie at a relative's house (Tr. 188). The prosecution then was allowed to call Dr. James Hord, a clinical psychologist, to testify about why a child might not quickly report an incident of child abuse, and whether it was likely that a child would watch a pornographic movie and then falsely accuse someone of child abuse. As to the former question, Dr. Hord said there were several reasons why a child might not report sexual abuse immediately, such as fear of the adult involved or confusion about whether the incident was supposed to be positive or not (Tr. 203). As to the latter question, Dr. Hord testified that such a scenario was possible, but that he had never seen it before (Tr. 204).

3. The Court of Military Appeals held that Dr. Chastain and Julie Mittleman had obtained information from Veda Jane for the purpose of developing a diagnosis and treatment plan for her (Pet. App. 4a). The court therefore held that Veda Jane's statements were admissible under Mil. R. Evid. 803(4) as statements made for the purpose of diagnosis and treatment (Pet. App. 4a). The court also concluded that Dr. Hord's testimony was helpful to the

factfinder and was admissible under Military Rule of Evidence 702 (Pet. App. 5a).

ARGUMENT

1. Petitioner contends (Pet 4-8) the trial court erred by allowing Dr. Hord to testify that children generally do not lie when they make allegations of sexual abuse. Stating the issue in that fashion, however, does not fairly characterize Dr. Hord's testimony, which was much narrower than that characterization suggests.

At a pretrial hearing, the prosecution informed the trial judge that it intended to call Dr. Hord as a witness in its case-in-chief in order to describe the general characteristics of the victims of child sexual abuse (Tr. 77). The trial judge stated that if Dr. Hord testified at all, he would not be permitted to express his opinion as to whether Veda Jane was truthful (Tr. 78). The prosecution reassured the court that Dr. Hord would testify only about the reactions of child abuse victims in general (*ibid.*). Nonetheless, the trial judge ruled that Dr. Hord would not be allowed to testify during the prosecution's case-in-chief unless the defense did something to "trigger" the admission of his testimony (Tr. 79, 80).

After the defense elicited from Julie Mittleman that petitioner and his wife had told her that Veda Jane may have seen some pornographic movies at the home of a relative (Tr. 188), the prosecutor sought to introduce Dr. Hord's testimony to rebut the suggestion that Veda Jane had made up the incident. The prosecutor noted that the defense's attack on Veda Jane's credibility was based on the time between the event and her report of it and the possibility that she may have seen a pornographic movie that gave her the idea for her story. The prosecutor explained that Dr. Hord's testimony could be enlightening on both of those points (Tr. 195, 197). The trial judge ruled

that Dr. Hord's testimony was not admissible to bolster Veda Jane's credibility, but that the government could present his testimony for the narrow purposes proposed by the government (Tr. 198). The prosecutor then called Dr. Hord and asked him two questions dealing with why a child might not quickly report sexual abuse, and whether a child might falsely claim sexual abuse after viewing a pornographic movie (Tr. 198-199, 203-204).

As the Court of Military Appeals explained (Pet. App. 5a), Dr. Hord did not testify about the truthfulness of children who are the victims of child abuse, or about Veda Jane's veracity in particular. Instead, his testimony was limited to his observations about particular characteristics he had observed in sexually abused children. Dr Hord had never personally interviewed Veda Jane (Tr. 196), and he did not offer any opinion about her credibility (Tr. 203-204). Contrary to petitioner's contention, Dr. Hord's answers to the prosecution's questions did not amount to an opinion that "all children are truthful" or "this child is telling the truth."[1]

The trial judge therefore did not err by permitting Dr. Hord to testify. Military Rule of Evidence 702, like its counterpart in the Federal Rules, permits a witness to give testimony in the form of an opinion if it will assist the trier of fact to understand the facts or to determine a fact in issue. *United States* v. *Gipson*, 24 M.J. 246, 251 (C.M.A. 1987). A trial judge has broad discretion in the admission or exclusion of expert evidence (see *Hamling* v. *United States*, 418 U.S. 87, 125 (1974)), and his decision will be sustained on appeal unless it is manifestly erroneous.

[1] For that reason, the decision below does not conflict with the cases cited by petitioner (Pet. 4 & n.1, 7 n.3), which involved expert or lay testimony stating an opinion that the victim was truthful.

Salem v. *United States Lines Co.*, 370 U.S. 31, 35 (1962); *United States* v. *Marabelles*, 724 F.2d 1374, 1381 (9th Cir. 1984).

Dr. Hord's responses to the hypothetical questions put to him were certainly helpful to the triers-of-fact, since his testimony involved matters about which most lay persons are likely to be unfamiliar. The Court of Military Appeals has held there is a sufficient body of knowledge regarding the typical behavior of child sex abuse victims to permit experts to testify about the victim's behavior patterns (*United States* v. *Snipes*, 18 M.J. 172, 179 (C.M.A. 1984); see *State* v. *Middleton*, 294 Or. 427, 433, 657 P.2d 1215, 1221 (1983) (expert testimony describing the reaction of the typical child victim of familial sex abuse is admissible)), and its ruling is consistent with the decisions of other courts that have considered similar questions.[2] The trial judge carefully limited Dr. Hord's testimony to the specific matters that had been raised by the defense. Absent an arbitrary or irrational application of that balancing test, the trial judge's decision should be upheld. See *United States* v. *Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978).

2. Petitioner also contends that Veda Jane's out-of-court statements should not have been admitted. His claim is quite narrow. He does not contend that Veda Jane's statements to the pediatrician, Dr. Chastain, or the

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[2] Expert testimony concerning the characteristics of victims of various offenses is commonly admitted. For example, evidence regarding the "battered child syndrome" is admissible to show absence of mistake. *E.g.*, *United States* v. *White*, 23 M.J. 84 (C.M.A. 1986); *State* v. *Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). Evidence relating to the "battered spouse syndrome" is admitted on the same basis. *E.g.*, *Ibn-Tamas* v. *United States*, 407 A.2d 626 (D.C. 1979); *Smith* v. *State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State* v. *Baker*, 120 N.H. 773, 424 A.2d 171 (1980).

psychologist, Julie Mittleman, were inadmissible as hearsay; rather, he appears to accept the conclusion of the Court of Military Appeals that those statements fell within the exception to the hearsay rule for statements made for the purpose of medical treatment or diagnosis (Pet. 9).[3] Moreover, petitioner does not suggest that the admission of those statements violated his right to confront the witnesses against him; he was given the opportunity to cross-examine Veda Jane, but he chose not to do so. Petitioner's sole claim is that Veda Jane's out-of-court statements were more prejudicial than probative and therefore should have been excluded under Mil. R. Evid. 403. That claim must be evaluated under a plain error standard, because petitioner did not object to Dr. Chastain's testimony or to Julie Mittleman's testimony on that ground at trial.

The Court of Military Appeals found no plain error in this case (Pet. App. 4a-5a), and that ruling was plainly

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[3] Rule 803(4), Mil. R. Evid, which was taken verbatim from the Federal Rules of Evidence, permits statements made for the purpose of medical diagnosis or treatment to be admitted at trial. The trial judge found that Veda Jane's statements were made to professionals who were treating her for sexual abuse (Tr. 71-73), and the Court of Military Appeals upheld the trial court's finding (Pet. App. 4a). The admission of such statements made to physicians and other specialists is well recognized in military and federal law. See *United States* v. *Welch*, 25 M.J. 23 (C.M.A. 1987) (statements made to clinical psychologist and psychotherapist); *United States* v. *Deland*, 22 M.J. 70 (C.M.A. 1986), cert. denied, No. 86-5019 (Oct. 6, 1986) (statements to psychiatrist); *United States* v. *Iron Shell*, 633 F.2d 77, 82-85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981), and *United States* v. *Iron Thunder*, 714 F.2d 765, 772 (8th Cir. 1983) (statements of sexual assault victims to physicians); *United States* v. *Nick*, 604 F.2d 1199, 1201-1202 (9th Cir. 1979) (statement of three-year-old assault victim to a physician).

correct. The admission of Veda Jane's out-of-court statements could not have prejudiced petitioner, because those statements were not materially different from the statements she made in her testimony at trial. To the extent that petitioner's defense was that Veda Jane's accusations against him were the product of imagination, suggestion by others, or possible exposure to a pornographic film, that defense was not impaired by the admission of Veda Jane's out-of-court statements, since petitioner's contention was that the impetus for her accusations arose before she made her statements to Dr. Chastain and Julie Mittleman. The mere repetition of her accusation, through the testimony of those two witnesses, was not enough to give rise to a significant risk of prejudice, and it certainly did not constitute a miscarriage of justice of the kind necessary to justify a finding of plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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